

**IOWA DEPARTMENT OF NATURAL RESOURCES**  
**ADMINISTRATIVE CONSENT ORDER**

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**IN THE MATTER OF:**

Ron and Joanne Kennedy  
Former Sidney DX  
501 Filmore Street  
Sidney, IA 51652

**UST NO. 198601719**  
**LUST NO. 7LTV96**

**ADMINISTRATIVE ORDER**  
**2008-UT- 04**

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**TO:** Ron and Joanne Kennedy  
1503 Chippewa Lane  
Council Bluffs, IA 51501

**I. SUMMARY**

This administrative order (Order) requires Mr. and Mrs. Kennedy to submit a Tier 1 site assessment report within 30 days and pay an administrative penalty of \$10,000 to the order of the Iowa Department of Natural Resources. The Kennedys have 30 days in which to appeal this Order. See Sections IV and V for more details.

Any questions regarding this Order should be directed to:

**Relating to technical requirements:**

Verne Schunk  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034  
Ph: 515/281-6704

**Relating to legal requirements:**

Tamara Mullen, Attorney  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034  
Ph: 515/281-8934

**II. JURISDICTION**

This Order is issued pursuant to Iowa Code sections 455B.474(1)(f)(11) and 455B.476, which authorize the Director to issue any order necessary to secure compliance with Iowa Code Division IV, Part 8 (underground storage tanks) and Department rules contained in 567 Iowa Administrative Code (I.A.C.) Chapter 135. Iowa Code section 455B.109 and Department rules in 567 I.A.C. Chapter 10 authorize the Director to assess administrative penalties up to \$10,000.

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**III. STATEMENT OF FACTS**

1. Ron and Joanne Kennedy owned and operated a gas station at 501 Filmore Street, Sidney, Iowa from 1986 to 2001. The Kennedys purchased the property from Red Line Oil, who had installed and registered 5 underground storage tanks (USTs) with the Department (two 2,000-gallon gasoline tanks; one 500-gallon oil tank; one 300-gallon oil tank; and one 30-gallon oil tank).
2. On September 19, 1990, the Department received a Condensed Data Sheet and Site Map indicating a petroleum release may have occurred. In response, the Department sent the Kennedys a letter dated October 12, 1990 requiring soil and groundwater sampling to confirm contamination. This was due in 60 days.
3. Also in October 1990, the Kennedys signed an UST Closure Notification Form indicating that two of the five tanks (the 300-gallon and the 30-gallon tanks) located at the property would be removed.
4. When the sampling results were not received, the Department sent overdue notices dated March 1991 and June 1991.
5. The Department contacted Mr. Kennedy by phone in November 1991 concerning the overdue sampling. Mr. Kennedy said he could not afford the testing; the Department encouraged Mr. Kennedy to contact the Iowa Underground Storage Tank Fund (Fund) for financial assistance. The Kennedys applied for aid with the Fund and were approved.
6. The Department sent another final notice to the Kennedys on December 20, 1991 requesting sample results in 60 days.
7. In response to this letter, the Kennedys hired James Riddle, Ph.D., P.E., and Clay's Pump & Equipment Co. to perform the confirmation sampling, which was conducted in February 1992. Contamination above state action levels was discovered, in addition to free product:

CHEMICAL	STATE STANDARD – WATER (ug/L)	FOUND – WATER	STATE STANDARDS SOIL (ug/g)	FOUND SOIL
Benzene	5	18,400	0.54	253
Toluene	1,000	28,700	42	2,280
Ethylbenzene	700	1,080	15	443
Xylene	10,000	12,600	No limit	2,290

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8. In May 1992, the Department required the Kennedys to conduct a Site Cleanup Report (SCR), which would more fully identify the contamination, its source, the area's geology, and outline proposed corrective action.
9. Geotechnical Services, Inc. (GSI) was hired to create the SCR, which GSI started but subsequently abandoned in October 1992 because GSI exhausted the Fund's initial \$20,000 financial assistance package and the Kennedys were unable to fulfill their required \$5,000 co-pay.
10. Subsequently, this site was enrolled in the Fund's Community Remediation Project (CRSCR #39) for the Cities of Clarinda & Sidney. Site investigations continued until August 1994 when GSI wrote a letter to the Fund recommending that the site be removed from the CRP because of possible cross contamination from non-petroleum sources. Immediately thereafter, the Fund deleted the site. Simultaneously, the Department's UST section transferred the property to the Contaminated Sites Section (CSS) based upon the presence of non-petroleum contamination in soil samplings; specifically, naphthalene at 440 ppb and 2-methylnaphthalene at 220 ppb.
11. In May 1995, CSS staff conducted on-site sampling at existing monitoring wells. These results indicated all contamination is petroleum based. The Department transferred the site back to the UST section.
12. The Department sent a letter to the Kennedys on May 25, 1995 informing them of this transfer back, and requiring that the SCR be completed. A due date of 180 days was given.
13. On September 1996 the Department learned that the Kennedys had allowed their financial responsibility to lapse.
14. "Ability to Pay" paperwork was sent to the Kennedys in April 1996, but was never received back.
15. On August 12, 1997 the remaining three tanks were removed, supervised by the Department's Field Office #4. It was observed that the soil underneath the piping and tank excavation was discolored, smelled, and appeared to be heavily contaminated. No groundwater was encountered. The Department waived the closure sampling requirement due to the Kennedys' financial hardship.
16. The finished SCR report from GSI was received by the Department in February 1998.
17. In August 1999, the Department sent a letter to the Kennedys requiring submission of a Tier 1 site assessment within 90 days.

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18. In September 1999, the Department contacted the Fund to encourage the Fund to reconsider the Kennedys for financial assistance eligibility as it had been concluded that the site was contaminated solely petroleum-based products.
19. In May 2001, the Fund denied the Kennedys financial assistance, stating that the site was ineligible because of lack of financial responsibility since 1994; the Tier 1 site assessment due by November 1999 was never submitted; and there was no documentation indicating that the non-upgraded USTs have been removed. The Fund informed the Kennedys of this determination in June 2001.
20. In September 2001, the Kennedys sold the property to Lester and Teresa Achenbach.
21. No action was taken until October 2006 when the Department sent another final notice letter to the Kennedys requiring submission of the Tier 1 site assessment; failure to submit would result in legal referral.
22. The Kennedys contacted the Department concerning this letter, expressing confusion over why a Tier 1 site assessment was needed eleven years after the tanks were removed. The Department explained the need to assess the actual nature and extent of the contamination, and encouraged the Kennedys to apply for financial assistance from the Fund, which under the Fund's new rules they would qualify for if they paid a "lapsed insurance fee."
23. The Department mailed one more final notice letter to the Kennedys in April 2008 requesting a Tier 1 site assessment. No response was ever received.
24. The Department proposed an administrative consent order to the Kennedys in November 2008. Due to the Kennedys' nonresponsiveness, no agreement was reached. As such, the Department is issuing this unilateral order.

#### IV. CONCLUSIONS OF LAW

1. Iowa Code chapter 455B, Division IV, Part 8 (sections 455B.471 - 455B.479) establishes the Underground Storage Tank (UST) program. Section 455B.472 declares that the release of regulated substances, including petroleum products, from USTs constitutes a threat to the public health and safety and to the natural resources of the state. Iowa Code section 455B.474 authorizes the Environmental Protection Commission (Commission) to adopt rules related to release detection and prevention, financial responsibility, tank closure, site assessment, risk classification, and corrective action applicable to all owners and operators of USTs. The Commission has adopted such rules at Chapters 567 I.A.C. 135 and 136.

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2. Iowa Code section 455B.471(6) defines "owner" of USTs. Because these tanks were in service after July 1, 1985, Mr. and Mrs. Kennedy are owners as defined and therefore are responsible for taking the actions contained in this Order.
3. Iowa Code section 455B.471(5) defines an "operator" of USTs as "a person in control of, or having responsibility for, the daily operation of the underground storage tank." Mr. and Mrs. Kennedy are operators as defined and responsible for taking the actions contained in this Order.
4. "Petroleum" or its constituent parts is a "regulated substance" as defined at Iowa Code sections 455B.471(7) and (8). A "release" of a "regulated substance" has occurred at the site as defined at Iowa Code section 455B.471(9).
5. Soil and groundwater sampling from 1992 show excess levels of benzene, toluene, ethylbenzene, and xylene. *See* 567 I.A.C. 135.14. When a site check indicates state action levels have been exceeded, owners and operators must begin risk-based corrective action, starting with a Tier 1 site assessment. 567 I.A.C. 135.6(3)(b)(2).
6. A Tier 1 site assessment determines whether the release of a regulated substance presents an actual threat to public health, safety, or the environment by determining whether receptors would actually be exposed to the highest concentrations of the substances found in soil and groundwater. *See* 567 I.A.C. 135.9(1).
7. A Tier 1 site assessment has been due on this property since November 1999.

**V. ORDER**

THEREFORE, the Department hereby orders Ron and Joanne Kennedy to comply with the following:

1. The Kennedys shall submit a Tier 1 site assessment within 30 days after receipt of this Order.
2. The Kennedys shall pay to the order of the Iowa Department of Natural Resources an administrative penalty of \$10,000 within 45 days of receipt of this Order.

**VI. PENALTY**

Iowa Code section 455B.477 authorizes the assessment of civil penalties in Iowa District Court of up to \$5,000 per day of violation for the violations involved in this matter. More serious criminal sanctions are also available pursuant to that provision.

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Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties. See 567 I.A.C. 10. Pursuant to this rule, the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an Order with a penalty.

**ECONOMIC BENEFIT:** A Tier 1 site assessment has been required since January 2000, more than 94 months ago. The Kennedys' economic benefit can be calculated by charging .53% interest on \$8,000 (a conservative estimate of a Tier 1) for each month of noncompliance. This equals \$42.40 ( $8,000 \times 0.0053$ ) times 94 months, for a total of \$3,985.60

**GRAVITY:** The failure to conduct a Tier 1 site assessment, even though benzene, toluene, ethylbenzene, and xylene were found above state action levels in 1992, means that the actual risk posed to public health, safety, and the environment is unknown. As such, \$3,000.00 is assessed for this factor.

**CULPABILITY:** The records show that the Department has informed the Kennedys of their regulatory obligations for more than 16 years. Moreover, the Department has consistently encouraged the Kennedys to contact the Fund for financial assistance; has talked directly to the Fund on their behalf; and attempted to compute the Kennedys' "ability to pay," although they failed to provide necessary information – all of which would provide the Kennedys with additional resources to complete the site assessment. In totality this shows that the Kennedys have been fully informed as to the need for a Tier 1 site assessment and how to go about getting one completed. Therefore, their noncompliance is deliberate. Accordingly, \$3,000.00 is assessed for this factor.

**Aggravating Factors:** The Kennedys have refused to sign for the Department's certified letters, requiring the Department to deliver time-sensitive communications via personal service. Therefore, an additional \$14.40 is assessed.

## VII. APPEAL RIGHTS

A written Notice of Appeal may be filed with the Director within 30 days of your receipt of this Order. A contested case hearing will then be commenced pursuant to Iowa Code chapter 17A and 561 I.A.C. 7. You may contact Tamara Mullen, Attorney for the Department, at (515) 281-8934 for more information regarding appeal procedures and resolution of this Order.

## VIII. NONCOMPLIANCE

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order

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may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.477.

  
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RICHARD A LEOPOLD, DIRECTOR  
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 24 day of Dec., 2008

**Ron and Joanne Kennedy:** Elaine Douskey; Verne Schrunk; Karen Anderson; Tamara Mullen; V.F.